

EDP Medical Computer Systems, Inc., Consumer Subscription Center, Inc. and Consumers Subscription Service, Inc. and Local 888, United Food and Commercial Workers International Union, AFL-CIO and Lawrence Wilson and David Arguelles and Local 888, United Food and Commercial Workers International Union, AFL-CIO and Jorge Lee. Cases 29-CA-11726, 29-CA-11799, 29-CA-11827, 29-CA-11845, 29-CA-11909, 29-CA-11917, 29-CA-11996, 29-CA-12006, 29-CA-12077, 29-CA-12097, 29-CA-12099, and 29-CA-12151

March 14, 1991

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

On August 3, 1990, Administrative Law Judge James F. Morton issued the attached supplemental decision on backpay.¹ The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions as modified and to adopt the recommended Order as modified.

1. The Respondent excepts to the judge's award of backpay to David Burgos, contending that Burgos failed to diligently seek interim work by unduly restricting his job search to that of a "postage machine operator." We find merit in this exception.

At the time of his discharge, Burgos testified that he had been employed for "close to a year" in the Respondent's office clerical department as a collections agent for the New York City Environmental Control Board (ECB). He testified in both the underlying un-

fair labor practice proceeding and the instant proceeding that his duties in that capacity consisted of working on the "accounts" of people who owed fines to ECB. He explained that he would contact people, usually by phone, "to tell them how much they owed, what the violations are for, [and] could we establish some kind of settlement." He would then "write out a little card stating what time I called them, what date. I put it in my own little folder." Those he did not reach by phone were sent form letters with details of the above information.

After his discharge, Burgos did not look for work as a collections agent or for any related office clerical work. Instead, he sought employment only as a postage machine operator, a position he once held when the Respondent's business consisted of mailing out subscriptions for magazines. He testified that he saw "a couple of ads" for this type of work and obtained a job as a casual employee for the U.S. Postal Service for approximately 1 month during the Christmas season.

It is well settled that to be entitled to backpay a discriminatee must make reasonable efforts to secure interim employment which is substantially equivalent to the position from which he was discharged. *Southern Silk Mills*, 116 NLRB 769, 773 (1956), enf. denied 242 F.2d 697 (6th Cir. 1957); *NLRB v. Seligman & Associates*, 808 F.2d 1155, 1166 (6th Cir. 1986), cert. denied 484 U.S. 1026 (1988). In determining the reasonableness of these efforts, the Board takes into account factors such as the discriminatee's skills and experience. *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962).

As noted, Burgos did not look for a job as a collections agent or for a substantially equivalent office clerical position. His stated reason for failing to look for such jobs was "because I didn't have enough experience in that field." Burgos' testimony in the unfair labor practice proceeding, however, indicates otherwise. There he testified that he held his collection job for almost a year before his discharge and that the "learning stage" of the job ended sometime before he returned from bereavement leave on March 4, 1985, which was approximately 4 months after he began the job. By September of that year, he testified that his supervisor was checking his work only "once in a while." It appears, therefore, that contrary to his self-evaluation, Burgos possessed the skills and, during his year-long tenure, acquired the requisite experience to seek employment as a collections agent or a similar office clerical employee.

We conclude, therefore, under the principles stated above, that by confining his employment search to postage machine operator jobs, Burgos failed to make an adequate search for employment. See *Knickerbocker*

¹Supplementing 284 NLRB 1232 (1987), 284 NLRB 1286 (1987), and 293 NLRB 857 (1989).

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent further excepted to the judge's denial of its request for a 30-day postponement of the hearing in this case because of an emergency appendectomy that its co-counsel had recently undergone. We find no merit in this exception in light of the assurances given to the judge by the Respondent's lead counsel at the beginning of the hearing that he had "no objection to moving on with the case" and that he was "prepared to go forward today."

In identifying the discriminatees whose overtime hours were unlawfully eliminated, the judge, at one point in his decision, mistakenly included Megaly Lopez rather than Ivy Valentine. We also note that the correct backpay sums which the Respondent shall pay to Haresh Manilal Shah and Mercedes Herasme are \$245.71 and \$210, respectively, rather than the different amounts specified by the judge in parts of his decision.

Plastic Co., 132 NLRB 1209, 1219 (1961) (Anthony Pavani). Accordingly, we deny his claim for backpay.³

2. We find merit in the Respondent's exception to the judge's finding that its obligation to make whole discriminatees Sarahnie Smith, Lynda Beradino, and Ivy Valentine for lost overtime "may well be a continuing one." The judge based this finding on the absence of any evidence that the Respondent has ceased its unlawful practice of refusing to assign overtime to the discriminatees. The backpay specification, however, states that Smith declined a valid offer of reinstatement on November 30, 1986. Accordingly, the Respondent's backpay liability to Smith is tolled as of that date. Valentine and Beradino both testified that they left the Respondent for new employment in July 1986 and July 1989, respectively. The Respondent's backpay obligation to Valentine and Beradino is, therefore, cut off on those respective dates.⁴

3. The Respondent raises for the first time in its brief in support of its exceptions that discriminatee Larry Wilson is not entitled to backpay because his job as a messenger to and from ECB was eliminated when the Respondent lost ECB as a client. We reject this contention.

In its answer the Respondent denied the net backpay allegation regarding Wilson "for reasons addressed in the affirmative defenses." The loss of the ECB contract, however, was not one of the affirmative defenses specified by the Respondent, nor did the Respondent seek to amend its answer or raise this defense during the backpay hearing. Accordingly, the Respondent is precluded from asserting this defense at this stage of the proceeding. *Southland Mfg. Corp.*, 193 NLRB 1036 fn. 3 (1971).

Further, even if timely raised, we find that the Respondent has failed to meet its burden of proving this defense. As noted in the underlying unfair labor practice proceeding, Wilson had been employed in the Respondent's production department where he performed both messenger and general maintenance work. 284 NLRB at 1257. One month prior to his unlawful discharge, his messenger duties were unlawfully eliminated and thereafter his work assignments consisted solely of maintenance work. 284 NLRB at 1279. Wil-

son testified in the instant proceeding that on his reinstatement he resumed some of his messenger work, although not for ECB, which he understood was no longer a client of the Respondent. It is clear, therefore, that despite the loss of ECB, there was a job as a messenger/maintenance worker to which Wilson could and did return. *Barberton Plastics Products*, 146 NLRB 393, 394 (1964), enf. denied on other grounds 354 F.2d 66 (6th Cir. 1965).

4. We find no merit in the Respondent's contention that the refusal by Esther Shaw to honor its subpoena to produce her letter of termination from Computer Horizons, her interim employer, warrants the inference that her discharge constituted a willful loss of earnings which disqualifies her from receipt of backpay for the period following her September 1989 discharge. The Respondent, whose burden it is to prove willful loss of earnings, does not meet that burden by relying solely on business records, such as in this case, a letter of termination from the interim employer. *Mid-America Machinery Co.*, 258 NLRB 316, 319 (1981). Accord: *P*I*E Nationwide*, 297 NLRB 454 (1989), enf. in relevant part 923 F.2d 506 (7th Cir. 1991). Further, although Shaw, acting on the General Counsel's instructions that the Respondent's subpoena was invalid, did not produce the requested letter of termination, in her testimony during the first day of the hearing she identified the individuals in the Parsippany, New Jersey office of Computer Horizons who effectuated her discharge and who were responsible for her termination letter. There is no evidence that the Respondent made any attempt before the hearing resumed 2 weeks later to contact those individuals or to produce them as witnesses to testify about the particulars surrounding Shaw's discharge. We conclude, therefore, as in *Mid-America Machinery*, that the Respondent has not sustained its burden of proof that Shaw willfully failed to maintain interim employment.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, EDP Medical Computer Systems, Inc., Consumers Subscription Center, Inc., and Consumers Subscriptions Service, Inc., their officers, agents, successors, and assigns, shall take the action set forth in the Order, except that David Burgos shall not receive any backpay and the backpay amount to be paid Mercedes Herasme is \$210.

April M. Wexler, Esq., for the General Counsel.

Martin Gringer, Esq. and Claire E. Boland, Esq. (*Kaufman, Frank, Naness, Schneider & Rosensweig, P.C.*), of Melville, New York, for the Respondent.

Larry Cary, Esq. (*Vladeck, Waldman, Elias & Engelhard, P.C.*), of New York, New York, for the Charging Parties.

³In light of this finding, we need not pass on the Respondent's alternative argument that the loss of the ECB contract resulted in the elimination of Burgos' job and his entitlement to backpay.

⁴Our finding regarding the backpay periods for Smith, Valentine, and Beradino does not affect the backpay amounts awarded by the judge because the General Counsel did not seek backpay for these discriminatees beyond these backpay periods.

In its brief in support of its exceptions, the Respondent contends for the first time that Beradino's backpay should be reduced for the 106 days that she was allegedly absent from work during the backpay period and for the days she attended the unfair labor practice hearing. This contention is rejected as untimely raised. Further, the record does not indicate which days, if any, Beradino was absent from work, nor does it indicate whether under the Respondent's policies, Beradino would have been paid for any days absent from work. Under these circumstances, the Respondent has failed to meet its burden to show that Beradino's backpay should be reduced for any absences.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The General Counsel issued a backpay specification in these consolidated cases seeking monetary awards against Respondent for the discriminatees.¹

Respondent's amended answer thereto was stricken in part in the Board's Supplemental Decision and Order.²

At the hearing, the General Counsel amended the specification to bring it up-to-date as of then. Those amendments related to the General Counsel's contention that backpay continues to accumulate for certain of the discriminatees and to further concessions by the General Counsel which reduced some backpay claims.

I heard this case in Brooklyn, New York, on February 20 and March 5, 1990. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

The backpay claims are divided into three categories—those involving discharged employees, those involving employees whose regular work hours were reduced, and those involving employees whose overtime work assignments were discontinued.

The formulas set out in the specification for determining the gross backpay amounts due the discriminatees are admitted to be appropriate. Respondent, however, asserted as an affirmative defense that there was no overtime work available to be assigned to certain of the discriminatees. The Board, in its Supplemental Decision and Order referred to above, had denied the General Counsel's motion to strike that defense based on Respondent's claim that "worsened business conditions" after April 12, 1985, mitigated its liability as to the elimination of overtime. This ruling was subject to a provision, discussed here.

Respondent also asserted that the discriminatees failed to report all interim earnings and failed to diligently seek or accept employment during their respective backpay periods. The pleadings also place in issue whether discriminatee Esther Shaw received a valid reinstatement offer.

The General Counsel placed in evidence payroll records of Respondent to support the pay rates and other data set out in the backpay specification. The General Counsel also arranged to have the discriminatees present at the hearing in order that they could be questioned by Respondent as to their interim earnings, their efforts to seek work, and as to other relevant matters. Respondent examined each of these discriminatees.

The principles applicable to the discriminatees' efforts to secure work during their respective backpay periods are well settled.³ Respondent has the burden of proving that a discriminatee forfeited backpay by establishing a clearly un-

justifiable refusal on the part of the discriminatee to take desirable new employment. It is not enough for Respondent to show that a discriminatee had low interim earnings; Respondent instead must affirmatively demonstrate that the discriminatee neglected to make reasonable efforts to find interim work. In determining the reasonableness of a discriminatee's efforts, his skills, qualifications and age are factors to be considered, along with area labor conditions. The test is whether the record as a whole establishes whether Respondent met its burden that the discriminatee failed to diligently seek interim employment. Any uncertainty in the evidence is to be resolved against Respondent as the wrongdoer.

Further, a discriminatee need not instantly seek new employment, nor seek employment in each and every quarter of the backpay specification—rather, the entire backpay period must be scrutinized; nor are claimants to be penalized for poor recordkeeping uncertainty as to memory, or even exaggeration, nor does a discriminatee need to have spent all of every workday seeking employment. *December 12, Inc.*, 282 NLRB 475, 477 (1986), and cases cited therein. Also, the fact that a backpay claimant may be unable to recall the names of employers contacted during the backpay period, occurring years previously, would not be enough to meet the burden of proving that a claimant did not reasonably search for work. *Arthur Briggs, Inc.*, 281 NLRB 789, 794 (1986), and cases cited therein. Nor does a claimant forfeit backpay simply because he did not register with a state employment agency as that is but one of the factors to be weighed. *Blue Hills Cemetery*, 240 NLRB 735, 736 (1979). An examination of all relevant factors is required. *Cornwell Co.*, 171 NLRB 342 (1968). There have been, however, occasions where one factor has been cited as determinative where no counterbalancing factors have been established. Thus, the Board held that a claimant had incurred a willful loss of earnings as he had filled out only one job application during four consecutive calendar quarters of the backpay period and as no offsetting factors were shown. *Rainbow Coaches*, 280 NLRB 166 (1986). Consequently, that claimant was awarded no backpay for those four quarters. See also *Flite Chief, Inc.*, 246 NLRB 407, 410-411 (1979), where a discriminatee was found not to have made a diligent search for employment where she had sought work only once a month in each of the 49 months of her backpay period. On the other hand, where a claimant applied to five prospective employers over a 4-month timespan, referred to newspaper advertisements for job listings and asked friends for job leads, the Board held that the employer in that case had failed to establish the claimant did not make a reasonable search for work. See *Vanguard Oil*, 246 NLRB 130, 133 (1979).

The foregoing principles have been utilized in evaluating Respondent's contention that the discriminatees had failed to diligently seek interim employment. Other principles, cited below, govern the other issues in this case.

The first of the discriminatees to be considered are those who had been discriminatorily discharged.

The discharged employees:

Esther Shaw: Shaw is a computer programmer who was unlawfully discharged by Respondent on March 1, 1985. Respondent asserts that her backpay period ended on August 31, 1987, when it offered her reinstatement. Respondent also contends that she had not diligently sought interim employment.

¹ See the Board decisions reported at 284 NLRB 1232 (1987), and 284 NLRB 1286 (1987), both enforced by the United States Court of Appeals for the Second Circuit.

² 293 NLRB 857 (1989).

³ See *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189 (1982), and cases discussed at 1197.

In the underlying case, the Board found that Shaw brought the Union into Respondent's facility and that she was summarily discharged by Respondent's president, Bernard Gelb, for having done so.

While she was in Respondent's employ at its facility in New York City, Shaw had been seeking work in other areas of the United States. Two weeks after her unlawful discharge, she obtained interim employment as a computer programmer in Denver, Colorado. Since then and until the third quarter of the calendar year 1989, she worked as a computer programmer in at least five other States. It was necessary for her to relocate every 6 months in order to keep that position and to support her two children. On September 1, 1989, she lost her job because she did not possess the particular skills required for it. She filed for unemployment insurance benefits and received them as her termination was not because she acted "in willful disregard of [the interim] employer's interest." Since that layoff, she has been interviewed for programming positions by several prospective employers. She testified credibly that she had an interview scheduled with a company for the day following the day she testified and that she anticipated that she would then be given a starting date for employment as a programmer with that company.

There is simply no probative evidence before me to find that Respondent proved she did not make a good-faith effort to secure interim employment.

Respondent separately contends that her backpay period ended on August 31, 1987, when it made her an offer of reinstatement. While the General Counsel concedes that the offer was made, the General Counsel further contends that she did not reject it but that, instead, Respondent's failure to respond to her inquiries thereto operated to continue the backpay period until such time as Respondent tenders a valid offer.

On August 31, 1987, Shaw was assigned by her interim employer to a location in Helena, Montana. Respondent's attorneys wrote her on that date "to offer [her] unconditional reinstatement to [her] job" She was instructed to contact Bernard Gelb by mail or phone by September 10, 1987, "so that [Respondent] can plan for [her] return to work." Shaw instead wrote Respondent's attorneys. She informed them that Gelb's "explosive termination of [her] employment caused numerous catastrophic traumas to [her family]." The record in the underlying case reveals that Gelb had discharged her, telling her that she had resigned when she clearly had not and that, when she told him in effect that she had not, he repeated seven or eight times, "You don't know me." In Shaw's letter to Respondent's counsel, she asked that the "terms of [her] unconditional reinstatement to be precisely defined." In her letter she also referred to a newspaper article about Bernard Gelb's having been indicted by a grand jury as a factor in her feelings in dealing with him. She received no reply to her letter. Respondent takes the position that her failure to call Gelb himself ended her backpay period and its obligation to offer her reinstatement.

At the hearing, Shaw testified that, when she got the August 31 letter from Respondent's counsel she was on an assignment in Montana which was due to end in April 1988 and that she was reluctant to "leave a client in the lurch with a half-completed project" especially as her interim employer had provided her with considerable assistance in relocating her.

The Board, in *L. A. Water Treatment*, 263 NLRB 244, 246 (1982), observed that "an employer's offer of reinstatement must be 'specific, unequivocal, and unconditional' in order to toll the backpay period." It is the employer who carries the burden of demonstrating a good-faith effort to communicate the offer to the employees. An employer is relieved of his duty to reinstate only when a proper offer is made and unequivocally rejected by the employee. The Board has also required that an offer of reinstatement must allow the employee a reasonable time in which to make arrangements to begin work. This requirement takes on a special significance where, as in the instant case, the employee has obtained other employment at the time the offer is made. In such circumstances, the Board requires that the reinstatement offer afford the employee an opportunity to make a considered choice whether to retain his present employment or to return to his former job. The offer must also allow the employee to give reasonable notice to his current employer should he choose the latter course.

Respondent's failure to reply to Shaw's inquiries and its bland reliance on its own offer compel a finding that it had no intention of affording Shaw a considered choice, as required. The letter its counsel wrote noted that Respondent needed her timely response so that it could plan for her return. While it sought an accommodation from her respecting its own plans, it had no interest in accommodating her concerns. These concerns were clearly valid ones. In view of Respondent's unwillingness to address them, I find that the August 31 letter was insufficient to toll Shaw's backpay entitlement or Respondent's continuing obligation to offer her reinstatement. See *Pepsi-Cola Bottling Co. of Mason City, Iowa*, 251 NLRB 187, 192 (1980).

I therefore find that Shaw's backpay period continues to run and that she is entitled to the interim award sought for her in the amended specification, with interest thereon until paid.

Joy Scott: As set out in the underlying decision, Scott, a data entry operator, was unlawfully discharged while she was on a leave-of-absence in early 1985 in order to care for her then terminally ill mother in England. She returned from England on April 2, 1985, and was refused reinstatement from her leave.

On June 1, 1985, she again went to England to care for her mother. No backpay is sought for her from then and until August 3, 1985, when she returned. She was offered reinstatement on August 18, 1985. Backpay is sought for her for the periods April 2 to June 1 and August 3 to 18, 1985.

Scott testified credibly that she had applied to employment agencies and answered job advertisements for data entry operators in New York City newspapers. Respondent has not shown that Scott did not make a good-faith search for employment during her backpay periods as set out above. See *Teamsters Local 164*, 274 NLRB 909, 913 (1985). Thus, Scott is to be made whole by Respondent for her unlawful discharge in the sum claimed for her in the amended specification, with interest.

Sarahnie Smith: Backpay is sought for Smith from the date of her unlawful discharge, April 4, 1985, to the date Respondent offered her reinstatement, November 30, 1986. Respondent contends that, in that interval, she did not diligently seek work.

Prior to her unlawful discharge, Smith had applied for a job with her present employer. Two weeks after her unlawful discharge, she began working for that employer and has worked steadily there since then. Respondent had not proved its contention. Smith is to be awarded the sum sought for her unlawful discharge, plus interest.

Megaly Lopez: Backpay is sought for her from her unlawful discharge on June 10, 1985, and until July 22, 1985, the effective date of Respondent's offer of reinstatement—a 6-week period. Respondent's answer avers that he failed in that time, to diligently seek employment.

Lopez had, prior to her discharge, taken a test to become a police officer. About 2 weeks after her discharge, she learned that she passed the test and that she would begin work with the police department on July 22.

The evidence is insufficient to establish that Lopez did not diligently seek work in the 6-week backpay interval. The Board has considered an analogous contention and rejected it. *Smith Mfg. Co.*, 277 NLRB 680, 681 (1985). I therefore find that she is to be awarded the amount, with interest, claimed for her as a result of her unlawful discharge.

Lawrence Wilson: Wilson had been discriminatorily discharged on July 8, 1985, and was reinstated by Respondent on September 10, 1987, to his job as a messenger and general helper.

No backpay is sought for the weeks from February 6 through May 16, 1986, because he was in military service then. Nor is a backpay award sought for the period between July 13, 1986, through July 24, 1987, because he had been awarded backpay therefor in a separate proceeding based on a contempt citation.

Wilson testified credibly that he held a number of odd jobs during his backpay period. Earnings therefrom have been credited to Respondent towards any award sought on Wilson's behalf. He had interim earnings while working at a retail establishment during a Christmas season and he worked 1 day for United Parcel Service. He testified that he did not register with the New York State Division of Unemployment Compensation because of the "red tape" involved.

The underlying decision in this case reveals that Smith's work habits had not been particularly exemplary. As the cases noted above indicate, a discriminatee's training, background, qualifications, and overall abilities, or lack thereof, are proper matters to be taken into account in deciding whether it has been shown that the discriminatee did not make a good-faith effort to find interim employment. In that context, I find that Respondent has not proved that Wilson failed to seek work in good faith. I further find that he is thus entitled to the amount claimed for him, with interest thereon, to remedy his unlawful discharge. Respondent contends that no backpay is due him for days he spent testifying against Respondent, citing *Iowa Beef Processors*, 255 NLRB 1328 (1981). Respondent however, failed to show that it otherwise would not have reimbursed him for the days he was not at work when testifying.

David Burgos: Respondent had discharged Burgos because of his union activities and because he testified at a Board hearing. His backpay period ran from October 10, 1985, to June 13, 1986. He received a backpay award, in a related contempt proceeding, for the period after June 13, 1986, and no award for that subsequent time is sought now.

Burgos testified credibly before me that he had registered for job referrals with the New York State Department of Labor, Unemployment Insurance Division, that he referred to job advertisements in newspapers, and that he had worked as a casual employee, during his backpay period, with the United States Postal Service.

Respondent has not shown that Burgos failed to seek interim employment and I thus find that he should receive the award claimed for him in the specification, with interest thereon.

Jorge Lee: Lee was discriminatorily discharged on November 18, 1985. His backpay period ended on August 31, 1987, on receipt of Respondent's valid offer of reinstatement.

While Respondent contends that Lee failed to seek equivalent employment during the period referred to above, the evidence is that he has worked virtually throughout the whole of that period and that, in a majority of the calendar quarters, his interim earnings exceeded the sums he would have earned had he been in Respondent's employ during those quarters.

There has been no showing by Respondent that Burgos had failed to diligently seek interim employment.

Respondent has also contended that the job Burgos held when he was discharged was later terminated for economic reasons. The evidence it proffered thereon consisted of conclusory hearsay, and uncorroborated testimony given by a witness whose testimony in the original hearing had been entirely discredited. I find no merit to Respondent's contention.

Burgos is to receive the sum, with interest, as sought for him to make him whole for his unlawful discharge.

The second group of employees for whom backpay is sought are:

Employees Whose Regular Hours had Been Reduced

In the underlying case, the Board found that certain employees had their regular work hours unlawfully reduced for the weeks ending March 15, 22, and 29, 1985. Respondent's answer, seeking to relitigate its claim of economic hardship was stricken by the Board in its Supplemental Decision and Order, discussed above. The awards as sought to remedy this violation are to be granted.

The names of the employees to be so made whole, with interest, are listed below and, alongside, the respective amounts of the awards:

| | |
|----------------------|----------|
| Marline Nosel | \$308.85 |
| Anna Goodall | 198.00 |
| Linda Jackson | 154.28 |
| Lucila Maisonavé | 290.00 |
| Hareesh Manilal Shah | 245.91 |
| Mercedes Herasme | 210.00 |
| Sarahnie Smith | 405.00 |
| Megaly Lopez | 466.57 |
| Ivy Valentine | 617.45 |
| Lynda Berardino | 447.00 |

The third group for whom backpay is sought are:

Employees Whose Overtime Hours Were Curtailed

The Board had found that Respondent unlawfully eliminated Linda Berardino's overtime hours on March 1, 1985, those of Sarahnie Smith also as March 1, 1985, and those

of Megaly Lopez on March 15, 1985. The Board, in its Supplemental Decision and Order, discussed above, denied the General Counsel's motion to strike Respondent's affirmative defense thereto—that "worsened business conditions" since April 12, 1985, eliminated overtime assignments. The Board's Order, however, allowed Respondent to offer evidence in support of the defense "provided that such evidence was not and could not have been raised in the underlying proceeding."

Administrative Law Judge Fish noted in the underlying case, 284 NLRB at 1241-1242 that, in May and June 1985, Respondent had increased the overtime hours of other employees, including a programmer. Judge Fish noted too that Respondent's efforts respecting the reduction in overtime "was, to say the least, inconsistent." He had reviewed the testimony of Judith Gelb, Respondent's secretary-treasurer who is also its personnel director. She had testified before Judge Fish that a decision was made in February 1985 to eliminate overtime because of reported financial difficulties. The officials she named as having so told her testified before Judge Fish but made no reference to that matter. In fact, its vice president of operations, Matthew Saffern, testified at the original hearing that, so far as he was aware, no decision was made to either reduce or eliminate overtime. He had attributed the elimination of overtime to a decision to eliminate a process of verification and, even there, he could not recall when that took place. Judge Fish rejected the evidence Respondent had proffered.

At the hearing before me, Judith Gelb acknowledged that she knows nothing about data processing. She testified also that Saffern told her that one-third of the work in his section had been lost. No documentation was offered to support that testimony nor did Saffern testify to corroborate it or to expand on it. Further, on reviewing her own records, Gelb acknowledged that Respondent now employs more data entry employees than it did in 1985. Lastly, Berardino testified for the General Counsel that, as late as 1989, Respondent has "sent out" computer work.

Respondent submitted no probative evidence to support its affirmative defense. If anything, Gelb's testimony before me is but a version of the testimony she gave before Judge Fish and is thereby separately found to be without merit as it is encompassed within the proviso to the Board's order relating to this affirmative defense as quoted above.

I therefore find that the three discriminatees affected by the unlawful reduction in overtime hours (Berardino, Smith, and Valentine) are to be made whole therefor, with interest, as set out in the amended specification. There is no evidence that Respondent has ceased its unlawful practice and its obligation to make whole discriminatees therefor may well be a continuing one.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, EDP Medical Computer Systems, Inc., Consumers Subscription Center, Inc., and Consumers Subscription Service, Inc., their officers, agents, successors, and assigns, shall pay to the employees named below the sums, respectively listed alongside each name, with interest.⁵

| | |
|---------------------|-------------|
| Esther Shaw | \$25,027.44 |
| Joy Scott | 2,335.46 |
| Sarahnie Smith | 9,305.84 |
| Megaly Lopez | 1,780.79 |
| Lawrence Wilson | 6,980.45 |
| David Burgos | 6,874.00 |
| Jorge Lee | 4,766.13 |
| Ivy Valentine | 6,667.76 |
| Lynda Berardino | 72,267.00 |
| Marilyn Nosel | 308.85 |
| Anna Goodall | 198.00 |
| Linda Jackson | 154.28 |
| Lucila Maisonave | 290.00 |
| Haresh Manilal Shah | 245.71 |
| Mercedes Herasme | 198.00 |

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵In accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Backpay will continue to accrue for several violations, still unremedied, as mentioned above.